Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-421–10 OF 2016
TENGKU MAIMUN, ZALEHA YUSOF AND KAMARDIN HASHIM JJCA
27 AUGUST 2018

Civil Procedure — Judicial review — Leave to file judicial review application — Respondent as secretary of registered society sought leave of court to apply for orders of certiorari and mandamus against appellant — Appellant refused to grant consent to respondent to apply to High Court for association to be made trustee of public charitable trust — Whether High Court right to grant respondent leave — Whether respondent's application was not frivolous or vexatious and concerned matter of public interest — Whether appellant's grounds to set aside granting of leave had no merits

By a trust deed executed in 1941, a testator had bequeathed lands ('the lands') and monies to construct and maintain a pagoda to enable members of a Buddhist association ('the association') to carry out their activities. The pagoda was never built and the bequeathed monies were used up. In 1982, the High Court declared the lands to be a public charitable trust ('the trust'). The association subsequently decided to raise public funds to build the pagoda. To enable it to do so, the association sought the appellant's consent under s 9 of the Government Proceedings Act 1956 ('the GPA') to apply to the High Court for an order to make the association a trustee in addition to, or in replacement of, the existing trustees of the trust. The appellant refused to give his consent. The respondent, as secretary of the association, applied to the High Court for leave to file a judicial review application to quash the appellant's refusal and to compel him to give his consent. The instant appeal was against the High Court's decision to grant leave to the respondent. The appellant argued that the High Court should not have granted the leave as, inter alia: (a) the respondent had no locus standi to make the application; (b) the appellant's decision to refuse consent was non-justiciable; and (c) the appellant's failure to file an affidavit to oppose the leave application was not fatal as it was not required in law to file such an affidavit.

Held, dismissing the appeal:

(1) At the leave stage, the court was not concerned with the merits of the judicial review application but with sieving out frivolous applications and

to see whether the applicant had an arguable case. The respondent's application was not frivolous or vexatious and merited further argument at the substantive stage. The building of a pagoda for religious and other activities for those professing the Buddhist faith was a matter of public concern. The appellant's decision was subject to the court's supervisory powers and the respondent, being the aggrieved party, should not have been shut out summarily at the leave stage (see paras 16 & 29).

(2) The law did not require the appellant to file any affidavit in reply at the leave stage. At the leave stage, the appellant was served not in his capacity as a respondent but in his capacity as the attorney general under O 53 r 3(3) of the Rules of Court 2012. He could choose not to appear, but if he appeared, the court had no jurisdiction not to hear him (see para 16).

(3) The respondent's application was made in his capacity as secretary — and therefore a public officer — of the association which was registered under the Societies Act 1966 ('the SA'). The members of the association, including the respondent, were aggrieved or adversely affected by the appellant's decision. The respondent had therefore shown a real and genuine interest in the subject matter of the application. The appellant's argument that the leave/judicial review application should have been made by 'two or more persons' as required by s 9(1) of the GPA was misconceived as s 9(1) could not be read in isolation but had to be read together with the SA (see paras 17, 20–21 & 23).

(4) The argument that the appellant's decision was non-justiciable had no merit. The respondent's application did not concern a criminal matter but sought consent to file a civil proceeding. The appellant did not have absolute discretion in civil law particularly when it involved public interest. On the face of s 9 of the GPA, the respondent could not take action without the appellant's consent. When the consent was refused the respondent had nowhere else to turn to but the court. On the facts of the case, the situation was appropriate for the court to exercise its judicial supervision (see paras 24 & 26–27).

[Bahasa Malaysia summary

Melalui surat ikatan amanah yang disempurnakan pada tahun 1941, pewasiat telah mewariskan tanah ('tanah-tanah tersebut') dan wang untuk membina dan menjaga pagoda untuk membolehkan ahli-ahli persatuan Buddha ('persatuan tersebut') menjalankan aktiviti-aktiviti mereka. Pagoda tidak pernah dibina dan wang yang diwariskan telah digunakan. Pada tahun 1982, Mahkamah Tinggi mengisytiharkan tanah-tanah tersebut sebagai amanah kebajikan awam ('amanah tersebut'). Persatuan kemudiannya memutuskan untuk memungut dana awam bagi membina pagoda tersebut. Untuk membolehkan ia berbuat demikian, persatuan memohon izin perayu di bawah s 9 Akta Prosiding Kerajaan 1956 ('APK') untuk memohon kepada Mahkamah

Tinggi bagi perintah untuk membuat persatuan pemegang amanah sebagai tambahan kepada, atau sebagai ganti, pemegang amanah sedia ada amanah tersebut. Perayu menolak untuk memberi izinnya. Responden, sebagai setiausaha persatuan tersebut, memohon kepada Mahkamah Tinggi untuk izin memfailkan permohoan semakan kehakiman untuk membatalkan penolakan perayu dan untuk memaksanya untuk memberikan izinnya. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi untuk memberikan izin kepada responden. Perayu berhujah bahawa Mahkamah Tinggi tidak patut memberikan izin memandangkan, antara lain: (a) responden tidak mempunyai locus standi untuk membuat permohonan; (b) keputusan perayu untuk menolak izin adalah tidak berjustifikasi; dan (c) kegagalan perayu untuk memfailkan afidavit untuk menentang permohoan izin adalah tidak serius kerana ia tidak dikehendaki dalam undang-undang untuk memfailkan afidavit sedemikian.

(1) Pada peringkat izin, mahkamah tidak mengambil berat tentang merit permohonan semakan kehakiman tetapi dengan menyaring permohonan yang remeh dan untuk melihat sama ada pemohon mempunyai kes yang boleh dipertikaian. Permohonan responden bukan remeh atau menyusahkan dan mewajarkan hujahan lanjut pada peringkat substantif. Pembinaan pagoda untuk aktiviti-aktiviti keagamaan dan lain-lain bagi mereka yang menganut agama Buddha adalah perkara yang menjadi perhatian umum. Keputusan perayu adalah tertakluk kepada kuasa pengawasan mahkamah dan responden, sebagai pihak yang tidak berpuas hati, tidak patut dihalang terus pada peringkat izin (lihat perenggan 16 & 29).

(2) Undang-undang tidak memerlukan perayu untuk memfailkan apa-apa afidavit jawapan pada peringkat izin. Pada peringkat izin, perayu diserahkan bukan atas kapasitinya sebagai responden tetapi dalam kapasitinya sebagai Peguam Negara di bawah A 53 k 3(3) Kaedah-Kaedah Mahkamah 2012. Dia tidak dapat memilih untuk tidak hadir, tetapi jika ia hadir, mahkamah tidak mempunyai bidang kuasa untuk tidak mendengarnya (lihat perenggan 16).

(3) Permohonan responden dibuat dalam kapasitinya senagai setiausaha — dan oleh itu pegawai awam — persatuan tersebut yang mana berdaftar di bawah Akta Persatuan 1966 ('AP'). Ahli-ahli persatuan, termasuk responden, tidak berpuas hati atau terjejas dengan keputusan perayu. Responden oleh itu telah menunjukkan kepentingan yang betul dan tulen dalam perkara subjek permohonan. Hujahan perayu bahawa permohonan izin/semakan kehakiman patut dibuat oleh 'two or more persons' seperti yang dikehendaki oleh s 9(1) APK adalah salah tanggap memandangkan s 9(1) tidak boleh dibaca secara berkecuali tetapi untuk dibaca bersama dengan AP (lihat perenggan 17, 20–21 & 23).

(4) Hujahan bahawa keputusan perayu tidak berjustifikasi tidak mempunyai

merit. Permohonan responden bukan berkaitan perkara jenayah tetapi memohon izin untuk memfailkan prosiding sivil. Perayu tidak mempunyai budi bicara mutlak dari segi undang-undang sivil terutamanya apabila ia melibatkan kepentingan awam. Mempertimbangkan terdahulu s 9 APK, responden tidak boleh mengambil tindakan tanpa izin perayu. Apabila izin ditolak responden tidak mempunyai tempat lain untuk meminta pertolongan kecuali mahkamah. Atas fakta kes, keadaan adalah wajar untuk mahkamah menjalankan pengawasan kehakimannya (lihat perenggan 24 & 26–27).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Dr Chandra Muzaffar v Universiti Malaya [2000] 1 MLJ 173, HC (refd)
Gouriet v Union of Post Office Workers and others [1977] QB 729, CA (refd)
Gouriet v Union of Post Office Workers and others [1977] 3 All ER 70; [1978] AC 435, HL (refd)
Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor [2015] 1 MLJ 675; [2014] 9 CLJ 321, CA (refd)
Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad [2004] 5 MLJ 495, HC (refd)
Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303, HC (refd)
Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35, CA (refd)
Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812, FC (refd)

Legislation referred to

Federal Constitution art 145
Government Proceedings Act 1956 s 9, 9(1), (1)(c)
Rules of Court 2012 O 53, O 53 rr 2(4), 3(3)
Societies Act 1966 ss 2, 7

Appeal from: Application for Judicial Review No PA-25–17–04 of 2016 (High Court, Pulau Pinang)

Rosli Ahmad (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Ravi Chandran (SC Ravi & Assoc) for the respondent.

Zaleha Yusof JCA:

[1] The attorney general, the appellant in this case, is appealing against the decision of the High Court at Penang which had on 28 September 2016, allowed the respondent's application for leave to commence judicial review proceedings under O 53 of the Rules of Court 2012.

[2] The application for leave to commence judicial review proceedings was against the refusal of the appellant to give consent under s 9 of the Government Proceedings Act 1956 ('the GPA') to initiate a proceeding for the purpose of appointing an additional trustee or a new trustee in public charitable trust of Liam Hood Thong Chor Seng Thuan Pulau Pinang.

BACKGROUND FACTS

[3] The facts are as appearing in the grounds of judgment of the learned judicial commissioner ('JC') which we will reproduce in the following paragraphs with minor modification.

[4] One Cheah Leong Kean, now deceased ('the testator'), had executed a will and codicil dated 6 May 1941 and a trust deed dated 6 May 1941 wherein the testator had bequeathed four pieces of land and cash in the sum of RM15,000 for the construction of a pagoda on the lands and a further sum of RM5,000 to be invested and the income arising from such investments to be used to maintain the pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the Deity Liam Hood Tong Chor Seng Tuan.

[5] The lands referred to in the will of the testator are all situated in Section 1, North East District in the State of Penang ('the said lands').

[6] Since the death of the testator the initial trustees had failed to carry out the building of the pagoda as per the terms of the trust and the sums of money had been used up completely. On 20 August 1982 an order declaring the said land to be a public charitable trust was handed down by His Lordship Judicial Commissioner Mustapha bin Hussain (as His Lordship then was) and that the principles of the cy-pres doctrine be applicable.

[7] Since that order the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo. A

[8] In the 35 years that has lapsed since the said order, there has been no effort by the trustees to carry out the wishes of the testator or by way of cy-pres and the said lands have been left vacant. B

[9] The said association comprises the followers of the Buddhist faith and devotees of the said deity. The association frequently has religious functions and prayers to the said deity. There is currently no place of worship for the deity and the association carries out these prayers and other religious and charitable functions at makeshift premises. C

[10] The association had endeavoured to secure funding from third parties to build the said pagoda. However as a precondition of the said promised funding, the association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreements on behalf of the said trust. D

[11] In view of the above the association had vide letters dated 20 November 2014 and 6 July 2015 applied to the Honourable Attorney General of Malaysia for consent under s 9 of the GPA so that an application can be made to the High Court for the association to be made a trustee in addition to or to replace the current trustees. E

F

[12] The attorney general vide a letter dated 17 February 2016 had refused to give his consent on the grounds that consent had been previously given to the current trustees on 15 March 2014. Aggrieved by the said decision of the attorney general, the association applied to the High Court for leave to commence judicial review of the said decision and for orders of certiorari and mandamus as prayed in the application. G

OUR DECISION

[13] Before us, on behalf of the appellant, the learned senior federal counsel ('SFC') had raised the following issues in submitting that the learned JC had erred in law and fact when he decided that: H

(a) leave should be granted as the attorney general failed to file affidavit to oppose the application for leave; I

(b) the respondent had locus standi/aggrieved party;

(c) the attorney general's decision was justiciable; and

(d) the judicial review proceeding was not premature.

[14] On the first issue, it was submitted on behalf of the appellant that the law does not require the attorney general to file any affidavit in reply at the leave stage. Especially in this case where there was no disputed fact that the application of the respondent had been refused by the attorney general and what was left was only issue of law. The learned SFC relied on the cases of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35; *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495, *Dr Chandra Muzaffar v Universiti Malaya* [2000] 1 MLJ 173 and *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303.

[15] Learned counsel for the respondent admitted that an affidavit needs to be filed when there are disputed facts. However he put more emphasis on the test for leave application where the threshold was very low; to see whether the applicant had an arguable case and that the application was not frivolous. He argued that the respondent had met the threshold and relied on the cases of *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675; [2014] 9 CLJ 321 and *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927.

[16] On this first issue, we wholly agreed with the learned SFC that the law does not require the attorney general to file any affidavit in reply at the leave stage. At the leave stage, the attorney general in this appeal was served not in his capacity as a respondent but in his capacity as the attorney general under O 53 r 3(3) of the Rules of Court 2012. He could choose not to appear but when he appeared, through the learned SFC, the court had no jurisdiction not to hear him. The court was not concerned with the merit of the application as the leave stage was merely to sieve out frivolous application and to see whether the applicant had an arguable case.

[17] On the issue of locus standi, the learned SFC argued that the respondent had failed to fulfil the criteria in s 9 of the GPA, which requires two or more persons to make such an application to the attorney general. He submitted that, as a person or an association, the respondent did not qualify to apply. He further submitted that the respondent should first get recommendation from the existing trustees in order to be a new trustee, and this, the respondent had failed to obtain. He referred to the grounds of judgment of Justice Mustapha Hussain which, inter alia, stated that the trustee may at their discretion appoint another person to be an additional trustee. He argued 'the trustee' means the existing trustee. The learned SFC also submitted that the respondent had failed to show in what manner he was adversely affected by the decision of the attorney general.

[18] The respondent on the other hand submitted that he brought the action in his capacity as the secretary of the said association which is a registered society under s 7 of the Societies Act 1966 ('the SA'). It was the members of the association who were aggrieved or adversely affected by the decision of the attorney general and the words 'any person' stated in O 53 r 2(4) of the Rules of Court 2012 also refer to a class of persons and not just individuals. He further submitted that the respondent being the secretary of the association is the public officer of the association and therefore the correct person to sue.

[19] We had considered these arguments. Section 9(1) of the GPA states, inter alia:

> In the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of:
>
> (a) asserting any interest or right in the trust property;
>
> (b) removing any trustee;
>
> (c) appointing a new trustee; ...

[20] It is true that s 9(1) of the GPA talks about two or more persons. However we were of the view, s 9(1) cannot be read in isolation. It has to be read with other relevant law. As this involves an association, the relevant law is the SA. Section 2 of the SA provides, inter alia, that a society includes any association of seven or more persons whatever its nature or object. Section 7 of the SA provides for the registration of a society. While s 9(1)(c) provides, inter alia, that a society may sue or be sued in the name of such one of its members as shall be declared to the registrar and registered by him as the public officer of the society for that purpose.

[21] Now we look at the entitlement of this judicial review application in this instant appeal. The applicant is 'Chin Chee Kow (No K/P 630212–02–5397) sebagai Setiausaha Persatuan Kebajikan Dan Amal Liam Hood Thong Chor Seng Thuan'. So, the application was clearly made by the applicant in his capacity as the secretary of the association (*sebagai setiausaha persatuan*). As the secretary, he was definitely a public officer of the association. The association itself as provided by the SA comprises not only of one person, but seven or more persons which surely are more than two persons as required by s 9 of the GPA. Hence we were of the view, that the learned SFC's argument that the respondent had failed to fulfil the criteria in s 9 of the GPA, was with due respect, totally misconceived.

[22] The issue of whether the existing trustees' recommendation was obtained or not or whether it was in fact required in order for such an application to be made to the attorney general, in our view, touched on the issue of merit which was not our concern at this leave stage.

[23] As stated earlier in the background facts, the association had endeavoured to secure funding from third party to build the said pagoda. However, as a precondition of the said promised funding, the association needs to be appointed as a trustee, to provide it with the necessary legal standing to execute agreement on behalf of the said trust. Therefore, the respondent was definitely adversely affected by the decision of the attorney general in refusing the consent. In our view, the applicant had shown a real and genuine interest in the subject matter. See the Federal Court decision in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145.

[24] Next issue raised by the learned SFC was on non justiciability of the decision of the attorney general under s 9 of the GPA. He relied heavily on the House of Lord's case of *Gouriet v Union of Post Office Workers and others* [1977] 3 All ER 70; [1978] AC 435 especially on the following passage:

> ... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney General.

[25] Learned counsel for the respondent submitted that *Gouriet*'s case, concerned a relator action in England and therefore the reliance on the case was misconceived. He relied on the case of *Teh Guat Hong*. Further the decision of the attorney general herein was not a decision made in a prosecutorial role and therefore should not involve unfettered discretion.

[26] We fully agreed with learned counsel for the respondent on this issue. In *Gouriet*, there was a proposed temporary union ban on communications to and from South Africa, which would have been criminal, and yet the attorney general had refused to sue or lend his name to a relator action. *Gouriet*, was concerned with the enforcement of the criminal law by way of an injunction in a civil suit. This is not the case with our instant appeal. The respondent herein did not file a suit to enforce the criminal law. His application was for a judicial review on the refusal of the attorney general to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the attorney general has unfettered discretion in relation to prosecution of criminal offence based on art 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal.

[27] A matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812. We opined there cannot be any absolute discretion in civil law particularly when it involves public, as this can lead to abuse. This appeal in our considered view, obviously involved public interest. 35 years had lapsed and there still had been no effort by the existing trustee to carry out the wishes of the testator's will. On the face of s 9 of the GPA, the respondent cannot take action without the attorney general's consent. With the refusal of the attorney general, where else could the respondent turn to but the court. We opined, the law cannot be too rigid. To borrow the words of Lord Denning in the English Court of Appeal of *Gouriet v Union of Post Office Workers and others* [1977] QB 729, 'What is to be done about it? The courts to stand idly by? Is the Attorney General the final arbiter as to whether the law should be enforced or not?' We were of the considered view, looking at the facts of this case, this was the appropriate situation for the court to exercise its judicial supervision.

[28] The last issue raised by the learned SFC was that the judicial review proceeding was premature as there was a pending case at Penang High Court vide a Writ of Summons No 21 NCVC-4–01 of 2015 filed by one David Cheah against the trustees which would entail the issue of removal of trustee. Learned counsel for the respondent submitted that the issue of premature should not be an issue as the respondent was not a party to the said writ of summons. We agreed with learned counsel for the respondent that this was a non issue as the respondent was not a party to the said action.

CONCLUSION

[29] After considering submissions made by the parties, written as well as oral, we were of the view that this was not a frivolous and vexatious application and that it merits further argument at the substantive motion. We were satisfied that the building of a pagoda for religious activities and purpose for those professing Buddhist faith was a matter of public interest. We were of the view that the attorney general's decision, just like other decision of decision makers, should be subject to the courts supervising powers. Hence the appellant, being an aggrieved party should not be shut out summarily at this leave stage. We therefore dismissed the appeal with no order as to costs.

Appeal dismissed.

Reported by Ashok Kumar